

# §504 LEGAL UPDATE

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## The Duty to Not Discriminate

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### **Parental attendance requirement for disabled child to participate in field trip wisely rescinded.**

*San Saba (TX) ISD, 25 IDELR 755 (OCR 1996).*

Parents of a student with spastic dysplasia/palsied left hand filed a complaint alleging discrimination with regard to a field trip to a museum and a state park. As was the district's practice, each student in the class received a parent permission form to be signed so that the child could attend. The student's parents signed the form, and indicated that the student could participate, but was not allowed to climb Enchanted Rock because of her disability. Shortly before the trip, the student's teacher sent home a note indicating that the student could not attend the trip unless a parent accompanied her. No other parent received a similar note from the teacher indicating that parental attendance was required for their child to participate. The parent immediately complained to the district, and the requirement was wisely dropped. OCR concludes that since the student participated in the trip without parental participation, there was no violation, despite the temporary lapse of compliance.

**Lesson:** It is unclear from the decision why the teacher demanded that the parent attend in order for the student to participate. However, even if the motive was valid and pure as driven snow, it does not remove the problem of creating an extra burden on the parents of a disabled child in order to receive benefit of an educational activity (a field trip).

### **Competitive athletic teams: disabled students receive equal opportunity to try out.**

*Maryville City (TN) School District, 25 IDELR 154 (OCR 1996).*

Parents of a student with Tourette's Disorder claimed discrimination when the student was not picked for the baseball team. They alleged that the coach knew of the child's disability and resulting behavior problems, and discriminated against the student for those reasons. The coach was able to demonstrate that the student failed to meet regular performance criteria to participate on the team. Students wanting to join the team participated in a series of drills which the coach observed and analyzed. The coach ranked the students on a variety of performance criteria: speed, balance, coordination, hand-eye coordination, sprint speed, lateral movement, and softness catching the ball. Out of fourteen students trying out for two openings, the claimant finished eighth, and did not receive a position on the team. OCR found "student was given an equal opportunity to compete for a position."

### **Student must be able to meet legitimate expectations of extracurricular activity position in order to keep it.**

*Crete-Monee (IL) School District 201-U, 25 IDELR 986 (OCR 1996).*

A 17-year-old student with Down's Syndrome alleged that district failed to allow him to participate in extracurricular activities to the maximum possible extent possible. The student was originally named as manager of the varsity basketball team. It soon became apparent that the student (who functioned on a first grade level) was incapable of fulfilling the duties of manager. The student did not understand the basics of basketball. For example, he could not identify travelling or a double-dribble. He could not keep a shot chart, and was not alert enough to move when the action left the court and players ran or fell into the bench area.

The coaches, concerned about his safety, removed him from the bench during games. He was not allowed on away games when it became clear that he required constant supervision, did not meet the bus on time, and could not make a long-distance phone call. Despite accommodations (including a volunteer coach who assisted him) the student was unable to perform the basic functions of the position of manager, and thus, was reassigned to co-manager duties which were limited to selling raffle tickets during home games. His parents complained about the change in duties, and also argued that the child was excluded from team pictures and newspaper coverage about the team. OCR found no violation with regard to pictures and coverage, as neither managers nor co-managers participated in team photo opportunities. OCR found no violation of §504 for moving the child to the co-manager position.

**Lesson:** While disabled students must receive an equal opportunity to try out for teams, if they are unable to fulfill the duties of the position with reasonable modifications, they may: (1) not make the team (as in the previous case) or (2) be assigned to different positions or duties. Note that while OCR has rejected the notion of classroom accommodations or modifications being limited to the “reasonable”, OCR has accepted the notion for purposes of extracurricular activities.

## **Discipline/Manifestation Determination**

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### **When do we need a behavior management plan (BMP)?**

*Committee Report on the 1997 IDEA Reauthorization*

While §504 students are not subject to the provisions of the IDEA, OCR frequently turns to IDEA for disciplinary rules (the application of the Jeffords Amendment on 45-day change of placement for 504 students with guns at school, for example). With the 1997 Reauthorization of the IDEA comes some guidance on when a behavior management plan is needed. “[I]n the case of a child whose behavior impedes the learning of the child or others, the IEP team [ARD Committee], as appropriate, shall consider strategies, including positive behavior interventions, strategies, and supports, to address that behavior.” In other words, if the child’s behavior impedes his own learning or that of children around him, the ARD Committee must develop a BMP to address the behaviors. This is excellent guidance for the §504 Committee as well.

### **A more refined approach to manifestation determination.**

*IDEA, 20 U.S.C. §651(k)(4).*

**NOTE:** Although the new manifestation determinations procedures from the IDEA have not yet been applied to §504 students by OCR, it is likely that they will have some impact down the road. It would be wise for §504 Committees to consider these changes when addressing the link determination for 504-eligible students.

**STEP 1:** The Committee first determines that the placement was appropriate and that the modifications were implemented. In short, the child was where he/she should be in order to have opportunity for benefit, and that the program established by the 504 Committee was in fact delivered to the child. If the program was not appropriate, or the appropriate program was not implemented due to the district’s failure to follow the accommodation plan, no disciplinary change of placement should occur. Instead, the program should be made appropriate.

**STEP 2:** The link inquiry examining the behavior-disability link becomes a two-part determination under the new rules. First, the ARD Committee determines that “the child’s disability did not impair the ability of the child to understand the impact and consequences of the behavior subject to disciplinary action.” That is, did the child have the cognitive ability to understand what he was doing violated school rules or the law?

**STEP 3:** The second part of the behavior-disability link question requires the Committee to determine that “the child’s disability did not impair the ability of the child to control the behavior subject to disciplinary action.” In other words, does the child have a disability affecting behavioral controls that kept the child from controlling the misbehavior?

**Whether the child knows right from wrong is *not* the proper link inquiry.**

*Tehachapi (CA) Unified School District, 25 IDELR 839 (OCR 1996).*

“OCR noted that the psychologist’s report included a statement that [the Student] knew right from wrong at the time of the incident. This raised a concern, since the issue of whether or not a student with a disability knows right from wrong is not the determining factor in whether misconduct is a manifestation of a disability. Any determination based on this consideration alone would not comply with Section 504 requirements.” In this case, in response to a parent complaint, OCR interviewed the psychologist who prepared the report. During that interview OCR became convinced that the psychologist’s conclusions were not based on that factor alone, but on a range of appropriate factors. OCR finds no violation in the link determination.

**Disciplinary transfer to a different school can be a significant change of placement.**

*William S. Hart (CA) Union High School District, 26 IDELR 181 (OCR 1996).*

A student transferred from one school to another for carrying a pocketknife in violation of district rules alleges that his transfer was in violation of §504. OCR finds that at no time did the district attempt to determine whether the conduct was related to the student’s ADD and obsessive compulsive disorder. While OCR found some evidence to suggest that the student was transferred rather than expelled (because of mitigating circumstances including the child’s disability), the transfer to a different school constituted a significant change in placement in violation of §504. Since the transfer occurred for disciplinary reasons and no link-inquiry was made, OCR found a violation of the ten-day rule.

**Thanks for appealing your suspension on the 9th day...**

*Derry Cooperative (NH) School District, 26 IDELR 322 (OCR 1996).*

After failing to find the child had ADD, the district nevertheless qualified him under §504 with an unspecified disability. Despite finding the child eligible, the district suspended him six days later for fighting with another student. The district did not bother to do a manifestation determination prior to ordering a twenty-day suspension. Luckily for the district, the student appealed the suspension on the *ninth* day, and was returned to school. On review, OCR finds that the district violated §504 by ordering a twenty-day suspension without conducting a manifestation determination. Because of the student’s fine sense of timing, the student served only nine days of the suspension. OCR found that the suspension time the student actually served did not constitute a significant change of placement.

Lesson: While occasionally the planets will align themselves and fate will be kind, don’t count on it.

**Calling the police in an evenhanded manner still o.k.**

*Marple Newton (PA) School District, 26 IDELR 180 (OCR 1996).*

A student with a learning disability used obscene language and “caused annoyance to the staff” at the high school resulting in the police being summoned to deal with his disorderly conduct. The student received a citation for his behavior. The student’s grandfather argues that the student was cited for behavior related to disability, and thus was subjected to discrimination. OCR finds that the police treated the student in the same way as nondisabled students, and that he was not issued a citation because of his learning disability. OCR finds that the student’s “annoying” behavior was not related to his being learning disabled, but OCR does not tell us how it came to that conclusion.

**No discrimination in discipline based on disability.**

*Calico Rock (AR) Public Schools, 25 IDELR 654 (OCR 1996).*

A student with disabilities was disciplined more severely than another student for the same offense (destruction of school property by smearing glue on walls and destroying a trash can). OCR determined that valid non-disability reasons existed for the difference in severity of disciplinary actions. The student in question was more highly involved in the incident, had previously destroyed school property, and had engaged in 8 prior disciplinary offenses.

## **Use of improper restraint**

*Chatham County (GA) School District, 26 IDELR 29 (OCR 1996).*

A visually-impaired student with autistic-like behaviors was restrained improperly by a para-professional. Upon learning of the incident, the district conducted an investigation and verified the misuse. It reprimanded the paraprofessional for the improper use, provided her additional training in the appropriate technique, and prohibited her from interacting in a disciplinary capacity with the student for the remainder of the school year. OCR finds the actions taken by the district in response to be appropriate.

**Lesson:** Use of restraint qualifies as corporal punishment in Texas, and its use subjects the employee to tort liability should the student be injured. Since the restraint which may be utilized by the employee has been previously approved by the §504 Committee, failure to use that approved technique, or failure to perform the technique in the proper way or at the proper time can all lead to tort liability in case of injury. Training of staff and strict compliance with the training in applying the restraint are key to reducing the risk of suit.

## **Isn't 35 disciplinary referrals enough? OCR thinks so.**

*Merced City (CA) Elementary School District, 25 IDELR 835 (OCR 1996).*

A student was the proud recipient of 35 disciplinary referrals during his sixth grade year. As a result of each referral, the student was removed from class and sent to the principal's office. Despite the large number, the district, *which knew the child had ADHD*, took no action to determine whether the behaviors giving rise to the student's constant presence in the principal's office were related to his ADHD. It was not until seventh grade when the student received 7 referrals in less than two months that the district called a §504 meeting to discuss the student's behavior. OCR: you waited too long to look.

## **OCR Procedures**

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### **Accommodate AND DO THE PAPERWORK**

*Temple (TX) Independent School District, 25 IDELR 252 (OCR 1996)*

A student required crutches after hip surgery. Teachers, counselor, and §504 Coordinator met to discuss arrangements for her education, and came up with a number of accommodations. The student was (1) allowed to leave class early or arrive late; (2) given "Buddy" assistance with books, opening doors, etc.; (3) allowed to have lunch in counselor's office with a few friends to avoid the rush of the cafeteria; (4) encouraged to use the existing ramp to enter and leave school; and (5) given several optional arrangements for attending a Spanish class held in portable building at some distance from school. OCR found insufficient evidence of discrimination: the student qualified for §504 services and was served. That is, the student's educational needs were met. Unfortunately, OCR determined that the district did not have procedures in place for documenting planned accommodations, or for informing parents of procedures and rights. So, the district did the right thing by providing what the child needed, but didn't comply with the procedural requirements and gets dinged for a violation.

**Lesson:** To avoid the violation, you must serve + comply with procedural safeguards.

### **Consent required for initial evaluation to §504.**

*Letter to Durham, 27 IDELR 380 (OCR 1997).*

There has been much debate in the §504 community over the requirement of parental consent prior to initial evaluation. Since the §504 regulations contain no such requirement, most folks logically assumed that consent was not required. Confusing issues was a 1995 *Letter to Zirkel, 22 IDELR 667 (OCR 1995)*, which stated that when parents refused consent for initial evaluation, the school district can use the due process hearing requirements to override the refusal. Implicit in this response is the notion that parental consent is required. Despite this letter, it does not appear that OCR ever enforced the requirement. In December of 1997, the OCR Southern Division Office in Dallas (which covers Arkansas, Louisiana, Mississippi, Oklahoma, and Texas)

indicated that consent was indeed required. “OCR has determined, through policy clarification, that the Section 504 regulation... requires parental consent prior to the conduct of initial student evaluation procedures[.] Parental discretion involving student assessment/ evaluation is an inherent part of the regulation and parental discretion is an appropriate and necessary policy component at the initial evaluation stage.”

Interestingly, this 1997 letter indicates (in one line with no citation or explanation) that there is no requirement for parental consent prior to subsequent student evaluations under 504. In the 1995 *Zirkel* letter, not only was parental consent required for subsequent evaluations, but districts were required to “initiate a due process hearing or take whatever actions are available to implement its decision if the parent refuses consent [to subsequent evaluations].”

Lesson: (1) Even though the regulations provide no hint of a consent requirement, OCR feels that one is there. (2) When consent is required and what a district must do when no consent is given seems to be a matter of some difference of opinion among the division offices. For our purposes, following the Southern Division is the safe position.

**OCR: Just the procedures, ma’m. Don’t confuse us with accommodations.**

*Virginia Beach City (VA) Public Schools, 26 IDELR 27 (OCR 1996).*

As in many previous letters, OCR held that the proper forum for resolution of disputes involving the appropriateness of a §504 plan was the §504 due process hearing procedures, as OCR primarily investigates procedural compliance with §504.

**Doing right once won’t convince OCR you’ll always do right. Adopt policies and procedures.**

*Desert Sands (CA) Unified School District, 26 IDELR 613 (OCR 1997).*

OCR found no problems with the manner in which the district suspended a child who had “difficulty with self-control”, but nevertheless was concerned that the district did not have policies and procedures for suspending/expelling students with disabilities. “[T]he lack of formal District policies provides little assurance that the District is likely to act in accordance with these requirements in future instances.”

## Parents

each field trip the student begins fresh. When he gets a check mark due to misbehavior, he is required to make it up by staying in class during lunch or by arriving early or leaving late. All accumulated check marks must be redeemed prior to the next field trip or the student cannot attend. The teacher reminded the student of his check marks prior to the trip, and he was able to take the required action to erase them.

OCR finds that the teacher “articulated a legitimate, nondiscriminatory reason” for her methods, and no evidence was uncovered that the system was used for retaliatory purposes, or that the student was treated differently from others in the class. On the issue of disparate treatment for the assault with a ruler, OCR found that upon discovery that other children had also committed the same conduct (on the same victim), the other perpetrators received the same punishment as this student. No retaliation is found.

**Lesson:** §504 is just as susceptible to parental distrust as the IDEA. Districts should be careful to listen to parents as they express their concerns so that distrust which may arise from even simple misunderstanding can be corrected before things get out of hand. Here, the teacher’s communication that the child was doing well was interpreted by the parent as meaning that there were no behavioral problems in class. That interpretation was clearly inaccurate. The teacher probably meant that there were no *major* problems, but that is not what mom heard. Mom heard that her child was doing well, and having no problems. When that message is later changed to “your child needs to come in and make up these check marks or he will miss the field trip,” parental distrust resulted, and perhaps the filing of the complaint.

## Graduation, Diplomas & Honor Roll

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### **Limited participation in elementary graduation ceremony not discriminatory.**

*Forsyth County (NC) School District, 26 IDELR 757 (OCR 1997).*

Parents of a student with severe ADHD challenge the district’s restriction of the student’s participation in her elementary school graduation exercise. The student had a number of behaviors, including frequent cursing, disrespect to strangers, biting, screaming, and fighting. While she and her classmates practiced for the ceremony, the student cried, screamed, threw tantrums, and begged to go back to the classroom. When she was allowed to return to class, she calmed and the behaviors ceased. The parents were notified of the student’s behavior, and agreed to have the child sit with an adult outside of the auditorium during the graduation program (so that she could remain calm) and then participate with her classmates in receiving diplomas at the end of the ceremony. OCR finds no violation, due in part to the parent’s agreement on limited participation, and certainly in recognition of the district’s efforts to respond appropriately to the child’s stress and anxiety levels as demonstrated during the practices.

**Lesson:** This case seems to underlie the notion that in order to participate in some activities with peers, the level of the disabled student’s involvement must be modified. The district’s response was to allow limited participation with her peers at a level which was consistent with the student’s anxiety. *See also, Crete-Monee, summarized above.*

### **Honor Roll & Academic Awards**

*Letter to Runkel, 25 IDELR 387 (OCR 1996).*

OCR articulates a variety of rules regarding grades and honors.

1. Eligibility for honor roll and academic awards cannot be decided automatically on the basis of disability status under IDEA or §504.
2. Notations on permanent transcripts are only appropriate to indicate modified curriculum (reduced mastery criteria or modified essential elements), not to designate instructional delivery modifications.
3. School districts can establish eligibility criteria for class ranking (i.e. weighted classes) as long as IDEA or §504 students are not arbitrarily excluded. The system must be based on “objective rating criteria” and special education or modified courses should not be weighted more lightly automatically. Grade level performance should not be part of the criteria.
4. Graduating students with disabilities cannot be excluded from the general graduation ceremonies.

### **Forget what OCR just said in Runkel?**

*Prince William County (VA) School Division, 25 IDELR 538 (OCR 1996).*

Directly contradicts OCR's decision in *Runkel* (above) by holding that grade level performance is a valid criteria for honor roll eligibility! Ignore this one, but be aware that aberrations exist.

### **Different diplomas for kids who have credits to graduate but don't pass exit exams o.k.**

*Moffat County (CO) School District RE-1, 26 IDELR 28 (OCR 1996)*

Award of different diploma to students who receive all necessary credits for graduation, but do not pass the statewide exit assessment, is appropriate. Ostensibly, this decision would appear to allow the denial of a diploma to Texas §504 students who are unable to pass the TAAS test.

## **Miscellaneous**

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### **The implicit §504 requirement of safe transportation**

*Todd v. Elkins School District No. 10, 25 IDELR 152 (8th Cir. 1997).*

A fourth-grader with muscular dystrophy broke his leg when he fell out of his unbuckled wheelchair while being pushed by a student on an unlevel playground. The district tried to get the case dismissed. The Circuit Court of Appeals held that the parents' allegations that the district discriminated against their son by intentionally transporting him in an unsafe manner stated a valid claim under §504. Furthermore, unlike IDEA, money damages are potentially available under §504. The Court also held that "implicit in the transportation requirement is the requirement of safe transportation." At trial, however, the parents will have to prove that the conduct was either intentional or with conscious disregard.

**Lesson:** Damages are a distinct possibility under §504. The truly frightening aspect of this case is the implicit requirement of safety. Should that requirement be read into a child's classroom placement, the possibility is open for an end-run around the Texas Tort Claims Act (which preserves school district immunity for tort claims except those arising from use or operation of a motor vehicle), and possible liability for students injured at school.

### **We think you're eligible for §504 but won't evaluate you**

*Marysville (WA) School District No. 25, 25 IDELR 992 (OCR 1996).*

When the student enrolled, the parent informed school officials that the child had ADHD, was in counselling, received medication daily, and had behavioral issues. The district agreed to administer medication, provide counselling, and to allow him to go to the counselor's office before, during and after school to avoid settings or circumstances where he could not control his behavior. Several months later, the parent referred the child for special education and consented to an evaluation. In December, the district (without an evaluation!) determined that the child was ineligible under §504, did not require an IDEA referral, and did not require further evaluation to determine §504 eligibility. In March, the student was suspended for eight days for throwing a tape ball at another student. Shortly after the incident, the student was determined ineligible for §504 (again), despite there being no evaluation of the student. Two months later, the district qualified the child solely on a medical evaluation performed *two years earlier* which found the child ADHD. OCR found plenty of problems, foremost of course, is the finding of ineligibility without first conducting an evaluation, and the district's continual refusal to evaluate.

**Lesson:** Strangely, OCR did not note the problem of finding eligibility solely on the basis of the two-year-old doctor's diagnosis. That action seems to be prohibited by the requirement that the district "draw upon information from a variety of sources" when evaluating a student. Perhaps OCR was so excited that the child was finally qualified that it ignored the problem.

Another lesson is that if the child is receiving medication, counselling, and assistance before, after, and during school to avoid settings where his behavior could be a problem (he was allowed

to go to the counselor whenever he was getting out of control), the child is being treated as an eligible 504 student anyway. Make it official and qualify him.

**Nice try but you really ought to show up to class.**

*Richland (SC) School District #2, 25 IDELR 763 (OCR 1996).*

A parent claimed that the district failed to consider the effect of her daughter's disability on her attendance. The district denied credit for Spanish class after the student was absent 31 times (20 absences was the limit for credit). After analyzing the absences, OCR found no violation, since only 8 of the 31 absences were medically excused.

**No duty under §504 to administer a dose of Ritalin above that which is recommended.**

*Davis v. Francis Howell School District, 25 IDELR 212 (8th Cir. 1997).*

Parent demanded that the district administer a dosage of Ritalin to a child with ADHD in excess of the recommended daily dosage in the Physician's Desk Reference. The nurse refused, but the parents were allowed to come each day and administer the medication themselves, or designate someone else to do so. The parents sought an injunction, which was denied. Since the district's refusal to administer Ritalin in excess of the recommended daily dosage was not based on disability, but rather on district policy, it was upheld.

**Playing collegiate basketball is not a major life activity**

*Knapp v. Northwestern University, 25 IDELR 193 (7th Cir. 1996).*

A college basketball scholarship recipient developed a cardiac condition, and was prevented from playing by the university. (While playing a pick-up game, the student suffered sudden cardiac death and had to be resuscitated). Despite its refusal to allow the student to play, the university honored its award of a scholarship. The court held that the student was not disabled under §504, because his heart condition did not substantially limit his ability to learn, and intercollegiate athletic participation was not a major life activity. The university's decision that the student's participation was unacceptably risky was based on competent medical evidence and entitled to deference. [Note that the court did not have to deal with the more difficult issue of whether high school football is a major life activity in Texas.]

**FAPE did not include M&M's and related strangeness**

*Chireno (TX) ISD, 26 IDELR (OCR 1997).*

The parent of a student with ADHD alleges a battery of discrimination complaints including the charge that the district denied necessary services when it stopped rewarding the student with candy. The parent also complained of a discrepancy between the student's report card and the teacher's grade book, and argued that the child was improperly disciplined for behaviors related to her disability.

On the candy issue, OCR found that the use of candy as a reward was not included as an incentive in the child's BMP nor was there any indication that the 504 Committee believed the awarding of candy to be an appropriate related aid or service necessary for the delivery of a FAPE. The grade issue was resolved in the district's favor upon OCR's finding that teachers frequently recorded grades in their books (which included bonus points) up to 107. However, when the grades were translated for report cards, letter grades were given. The process was the same for all students, thus there was no discrimination.

The discipline issue was made somewhat easier to resolve in light of the fact that there was no evidence that the district had taken any disciplinary action against the student. So, there could be no discriminatory disciplinary action. District prevails on all claims.